IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 158 of 2007

with
CIVIL APPLICATION No.6132 of 2007
in
APPEAL FROM ORDER No. 158 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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LILABEN WD/O LAKHIRAM DASWANI - Appellant(s)
Versus
PURSHOTTAM JEUMAL DASWANI - Respondent(s)

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Appearance :
MR AJAY S JAGIRDAR for Appellant(s) : 1, 1.2.2, 1.2.3, 1.2.4, 1.2.5, 1.3.1,1.3.2
MR.J S.SADHWANI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 03/05/2007

ORAL JUDGMENT

Admit. Mr.J.S. Sadhwani, learned advocate waives service of process of admission. At the request and

with the consent of the learned advocates the matter is taken up for final disposal. The appellants herein- original plaintiffs are before this Court being aggrieved by order dated 22.03.2007 passed by the learned Chamber Judge, Court No.14 of the City Civil Court, Ahmedabad, below Exhibits 23 and 27 in Civil Suit No.202 of 2007 on 31.01.2007. The learned Chamber Judge who was moved for grant of urgent ex parte injunction granted the same. The order reads as under:

> “Considering the facts and circumstances of the case following final order is passed.
>
> Issue urgent notice on payment of EPF to the defendant.
>
> Returnable on 7/2/07.
>
> Till then, the defendant is directed to maintain status quo qua title of the suit property as existing today and status quo qua possession of the suit property in view of the court commissioner report appointed today.

The plaintiffs to act in strict compliance of Order-39, Rule03 of the Code of Civil Procedure.”

The plaintiffs and the defendants are related to each other. The plaintiffs are the heirs of deceased-Lakhiram Jeumal Daswani, who happens to be brother of defendant-Purshottam Jeumal Daswani. The suit is filed for a declaration that, 'the suit property is of the ownership of Hindu Undivided Family and hence defendant is not having any right to sell or grant lease and licence or transfer in any manner'.

Besides, it was also prayed that the defendant be restrained from obstructing the plaintiffs from carrying on business in the suit property, he should not obstruct the plaintiffs from going in the property and possession of the suit property be not transferred to any third party either by sale, lease, licence or by any other means.

2. Along with the suit an application for injunction, exh.7 was filed wherein the aforesaid

order is passed.

3. Order XXXIX, Rule 3 of the Code of Civil Procedure ("the Code" for brevity) provides for a notice to be directed by the court to opposite party before granting injunction. Clauses (a) and (b) are the duties cast on the party in whose favour the court exercises discretion and grants ex parte injunction. Clauses (a) and (b) read as under:

> "(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with --
>
> (i) a copy of the affidavit filed in support of the application;
> (ii) a copy of the plaint; and
> (iii) copies of documents on which the applicant relies, and
> (b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent."

4. In the present case the respondent herein-

original defendant filed exh.27 on 21.03.2007 stating that the injunction order is served to the defendant on 06.02.2007, that the plaintiffs have committed breach of Rule 3(a) & (b) of Order XXXIX of the Code, that the plaintiffs have not filed any affidavit as required under Rule 3(a) and (b) of Order XXXIX of the Code. The provisions of Order XXXIX, Rule 3(a) and (b) of the Code are mandatory provisions and as the plaintiffs have committed breach of the said provisions, status quo order be cancelled.

This application is replied by exh.29, wherein reasons are set out for the alleged breach by not filing affidavit.

The contents of exh.29 are important. It is stated therein that the plaint, the injunction application, summons thereof, process were served to the defendants by the Court Bailiff. The said summons/ process is accepted by defendant. That the defendant signed in acknowledgment thereof in presence of the plaintiffs.

What follows is important. It is stated that thereafter the defendant went to the suit property and broke open the lock which gave rise to Police case and plaintiffs no.1/4 and 1/5 along with defendant and his son were taken into custody. In this connection the plaintiffs were required to visit Police Station and the court which resulted into their mental ill health and therefore, the plaintiffs could not comply with the direction given by the court and could not file affidavit.

It is prayed that the said lapse on the part of the plaintiffs be condoned and application filed by the defendant be rejected.

It is after taking into consideration the contents of exh.27 and reply thereto-exh.29, the learned Chamber Judge has passed order on 22.03.2007, the operative part of which reads as under:

> "(a) The application of the plaintiff vide ex.23 is hereby rejected.
>
> (b) The application, ex.27 of the

defendant is hereby granted.

(c) Ad interim injunction granted on earlier occasion hereby stands vacated forthwith.

(d) The N.M. be notified in its Regular Board for hearing.”

5. This order is challenged in the present Appeal From Order.

6. Learned advocate Mr.Jagirdar for the appellants submitted that in light of the fact that the process of the Court was served to defendant on 06.02.2007, the learned Judge ought to have condoned the lapse on the part of the plaintiffs. He submitted that the entire object of Order XXXIX, Rule 3, Clauses (a) and (b) of the Code is to see that, 'the plaintiff does not pocket an ex parte injunction and shuts the opportunity to defendant to come to the court and contest the order'. The aforesaid object is reflected in the observations made by the Hon'ble the Apex Court in the matter of **A. Venkatasubbiah Naidu Vs. Chellappan and others**, reported in A.I.R. 2000 SC

3032, wherein the Hon'ble the Apex Court was pleased to observe as under:

> "If a Court which passed the order granting interim ex parte injunction did not record reasons thereof or did not require the applicant to perform the duties enumerated in clauses (a) and (b) of R. 3 of Order 39, such an order can be deemed to contain such requirements at least by implication even if they are not stated in so many words. A party, in whose favour an order was passed ex parte, must deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of application for injunction together with a copy of the affidavit filed in support of the application; a copy of the plaint; and copies of documents on which the applicant relies, and to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent. If he fails to comply with the duties which he has to perform as required by the proviso, he must take the risk. Non-compliance with such requisites on his part cannot be allowed to go without any consequence and to enable him to have only the advantage of it. The consequence of the party (who secured the order) for not complying with the duties he is required to perform is that he cannot be

> allowed to take advantage of such order if the order is not obeyed by the other party. A disobedient beneficiary of an order cannot be heard to complain against any disobedience alleged against another party." (emphasis supplied)

The Hon'ble the Apex Court has very succinctly laid down the consequences of non compliance of the aforesaid clauses (a) and (b) of Rule 3 of Order XXXIX of the Code. The learned Judge ought to have taken into consideration the object behind the clauses (a) and (b) in Rule 3 of Order XXXIX of the Code.

7. Present is not the case wherein the plaintiffs after obtaining the order tried to win a march over the defendant and have come to the Court complaining that the defendant has not complied with the order (ex parte injunction) issued by the Court. In fact, in exh.29, a reply to exh.27, circumstances are narrated in which the plaintiffs could not comply with the requirement under Clauses (a) and (b) of Rule 3 of Order XXXIX of the Code of Civil Procedure. But the Court lost sight of the fact that the order

which is passed on 31.01.2007 was served by the plaintiffs with the Bailiff of the Court on 06.02.2007. It is after service of that order the defendant conducted himself in a manner to which the plaintiffs can also be said to have contributed which resulted into lapse on the part of the plaintiffs. The lapse on the part of the plaintiffs was required to be considered by the learned Judge and condone the same. The learned Judge was not required to pass a mechanical order of vacating the interim injunction. The learned Judge has taken too technical approach in the matter and ordered that 'Notice of Motion to be notified in its regular Board for hearing'.

8. Mr.Sadhvani, learned advocate appearing for the opponent herein submitted that the learned Chamber Judge has passed a just order required under law. In support of his submission he relied upon a decision of this Court in the matter of **Administrator of Shri Shakti Group, Chandrakant Natverlal Agravat Vs. Hargovindbhai Shamjibhai & Sons**, reported in 1993 (1) GLR 434.

The said decision has no application to the facts of the present case. It only deals with whether the order passed (ex parte injunction) can be said to be in consonance with law or not and it is held that if the requirement of clauses (a) and (b) of Rule 3, Order XXXIX of the Code are not fulfilled, order of injunction cannot be said to be in consonance with law. Whereas the judgement of the Hon'ble the Apex Court provides for what is to be done thereafter. The learned Judge has erred in passing order dated 22.03.2007. The same is hereby quashed and set aside and interim order passed on 31.01.2007 is ordered to be continued till final hearing of the 'Notice of Motion'.

9. At this juncture, on request of both the learned advocates the learned Judge is directed to hear the 'Notice of Motion' as expeditiously as possible preferably within three months from the date of receipt of the writ of this Court. The Appeal From order is allowed.

CIVIL APPLICATION No.6132 of 2007

10. In view of the order passed in the Appeal From

Order, no order on Civil Application No.6132 of 2007.

The same is disposed of.

(RAVI R. TRIPATHI, J.)

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